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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

CITICORP INDUSTRIAL CREDIT, INC.,
Petitioner,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

**BRIEF FOR THE AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
AS AMICUS CURIAE IN SUPPORT OF RESPONDENT**

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**BRIEF FOR THE AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
AS AMICUS CURIAE IN SUPPORT OF RESPONDENT ***

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 91 national and international labor organizations with a total membership of approximately 13,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

I. Section 6 of the Fair Labor Standards Act ("FLSA"), requires "employers" covered by the Act to pay specified minimum wages to their employees and FLSA § 7 requires such employers to observe specified maximum hours of work for their employees. FLSA § 15(a)(1) provides, in turn, that

it shall be unlawful *for any person*

to transport, offer for transportation, ship, deliver or sell in commerce, or to ship, deliver or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7 . . . [Emphasis added.]

The question in this case is whether § 15(a)(1) bars a secured creditor who has foreclosed on goods from selling the goods in interstate commerce where the employees producing those goods were not paid the wages required by §§ 6 and 7. The language of the statute, buttressed by abundant evidence of its purpose requires that this question be answered "Yes".

* Throughout this brief, "Pet. App." will refer to the appendix to the Petition for Certiorari; "Pet. Br." will refer to the Brief for Petitioner Citicorp; "C.A. App." will refer to the Joint Appendix of the parties in the Court of Appeals. Petitioner Citicorp Industrial Credit, Inc., will be referred to as "Citicorp" or "the Company".

The term "person" is broadly defined in FLSA § 3(a) to include, *inter alia*, a "corporation" such as petitioner, Citicorp Industrial Credit, Inc. Congress deliberately chose the all-encompassing word "person" to identify the targets of § 15(a)(1) in contrast with §§ 6 and 7 which are aimed only at "employer[s]". A court may carve out an exception to such unambiguous language only where it is "essential to prevent 'absurd results' or consequences obviously at variance with the policy of the enactment as a whole." *United States v. Rutherford*, 442 U.S. 544, 552. And taking Congress at its word in construing § 15(a)(1) is wholly consistent with, and necessary to effectuate, the policy of that section and of the FLSA as a whole. As explained in *United States v. Darby*, 312 U.S. 100, 115:

The motive and purpose of [§ 15(a)(1)] are plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows.

Darby's understanding is, as we show, abundantly supported by the legislative history of the FLSA, from President Roosevelt's May 24, 1937 message through the Congressional Hearings, Committee Reports, and debates. These legislative materials refute Citicorp's central thesis that § 15(a)(1) "is only a mechanism to encourage compliance [by employers] with substantive requirements prescribed elsewhere in the Act." (Pet. Br. 16.)

That legislative history also provides no support whatsoever for Citicorp's view that "innocent purchasers" (a category to which Citicorp says it belongs) were not to be covered by § 15(a)(1). This theory is predicated, in part, on the language and legislative history of what became FLSA § 3(i), which excludes from the definition of "goods" only those which are in the "actual physical possession of the *ultimate consumer* . . ." It

rests also on provisions in bills which were not enacted, and which would not have protected persons in Citicorp's position even if they had been.

Citicorp's reliance on the legislative history of a 1949 amendment, which excepts from § 15(a)(1) sales "by a purchaser who acquired [the goods] in good faith reliance "on written assurance from the producer that the goods were produced in conformity with the Act," and "without notice of any . . . violation" of the Act, is doubly misguided. That amendment does not go so far as to protect Citicorp here, and the statements on which Citicorp relies, made by three Congressmen in the 1949 House Hearings, are plainly not a part of the legislative history of the Act as adopted in 1938. See, *e.g.*, *Oscar Mayer Co. v. Evans*, 441 U.S. 750, 758; *United States v. Price*, 361 U.S. 304, 313.

II. Citicorp attempts to recast the issue in this case by asserting that under the decision below § 15(a)(1) grants employees who have not been paid the wages due them under the FLSA a "priority" in the goods superior to that which a secured creditor has under various state and federal laws by virtue of its perfected lien on those goods. The Court of appeals made no such error. *That court did not dispute that Citicorp lawfully possesses the goods on which the Company foreclosed; and the court below did not grant Ely's employees (or the Secretary) any possessory interest in those goods.* It said:

Our holding does not change the priorities in bankruptcy. Citicorp "owns" the goods. The "hot goods" provision merely prevents Citicorp from shipping, delivering or selling the goods in interstate commerce. [Pet. App. 10a.]

The decision below does not interfere with any of the "creditors' rights" (Pet. Br. 2) which are governed by states through Article 9 of the Uniform Commercial Code. The Code does not give foreclosing creditors a right to sell goods which public law would forbid the debtor to sell if he were their owner; nor did any of the state uniform laws which were in effect in 1938, when

§ 15(a)(1) was enacted, do so. More generally, neither the Code nor its predecessors regulate at all the conditions under which it is lawful or unlawful to sell goods in interstate commerce; that is Congress' prerogative, exercised in § 15(a)(1). "Secured creditors such as Citicorp take their security subject to the laws of the land," (Pet. App. 33a, 25a), including the FLSA. Thus, to construe § 15(a)(1) according to its terms to include goods which are in the possession of secured creditors does not preempt any state creditors' rights law or conflict with any federal statute.

Citicorp's characterization of itself as "innocent" is immaterial, because, except with respect to good-faith purchasers without notice, § 15(a)(1) does not distinguish between innocent "persons" and non-innocent "persons" who ship substandard goods in interstate commerce. Moreover, Citicorp's claim of innocence is wholly unjustified. Under the arrangement between Citicorp and the borrower/employer Ely, all of the latter's expenses, including the payroll, were financed from funds advanced by the lender. When Citicorp, after deciding to cut off Ely's funds, permitted Ely to continue to produce goods, the company knew that the employees could not be paid for working. Citicorp expected to profit from this unpaid labor because all receivables were paid into a Citicorp bank account, and Citicorp planned, if it became necessary to foreclose, to sell the goods "and apply the proceeds against the outstanding Ely loan balance," (Pet. Br. 5).

At the end, petitioner urges this Court not to "re-examine" the 1966 ruling in *Wirtz v. Powell Knitting Mills*, 360 F. 2d 730 (C.A. 2), which held that § 15(a)(1) does not apply to secured creditors and which the Sixth Circuit herein after careful consideration "refuse[d] to follow" (Pet. App. 7a-11a). Citicorp's suggestion is as revolutionary as it is desperate, for it reverses the hierarchical relationship among the federal courts. Finally, Citicorp's contention that *Powell Knitting* should not be re-examined because the Secretary of Labor's inter-

pretation of § 15(a)(1) would adversely affect commercial lending practices carries its own death wound. It would certainly have been contrary to the 1938 Congress' policy to enable employers to borrow money more cheaply by permitting the lender to place into commerce goods produced by workers who have not received the wages prescribed by the FLSA.

ARGUMENT

I. The Court Of Appeals' Construction Of § 15(a)(1) Of The Fair Labor Standards Act Is Faithful To Its Broad And Unambiguous Language And To Congress' Equally Broad and Clearly Articulated Policy

A. Section 206 of the Fair Labor Standards Act, 29 U.S.C. § 206, requires "employers" covered by the Act to pay specified minimum wages to their employees, and FLSA § 207, 29 U.S.C. § 207, requires such employers to observe specified maximum hours of work for their employees. FLSA § 15(a)(1), 29 U.S.C. § 215(a)(1), provides, in turn

. . . that it shall be unlawful for any person—to transport, offer for transportation, ship, deliver or sell in commerce, or to ship, deliver or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; . . . [Emphasis added.]

Section 15(a)(1) does contain two exceptions to its broad scope, neither of which are claimed to apply in terms here and which we set out in the margin.¹ And,

¹ Section 15(a)(1)'s exceptions provide that

no provision of this chapter shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transporta-

FLSA § 3(a), 29 U.S.C. § 203(a), defines "person" as "an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons;" § 3(d) defines "employer" more narrowly as including "any person acting directly or indirectly in the interest of an employer in relation to an employee . . ."; and § 3(i), while defining "goods" broadly, excludes "goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer or processor thereof."

These interrelated provisions on their face are most naturally read as stating that § 15(a)(1)'s prohibition applies to a "corporation"—like petitioner Citicorp Industrial Credit, Inc.—whether or not the corporation is an "employer", which comes into the possession of goods produced in violation of §§ 6 or 7, which attempts to move those goods in interstate commerce, and which is not entitled to the protections afforded by the exceptions to § 15(a)(1) or to § 3(i). It is especially significant in this regard that Congress chose the all-encompassing word "person" to identify the targets of § 15(a)(1), whereas §§ 6 & 7 are aimed only at "employer[s]".

B. In *United States v. Rutherford*, 442 U.S. 544, the Court said:

When construing a statute . . . explicit in scope, a court must act within certain well-defined constraints. If a legislative purpose is expressed in "plain and unambiguous language, . . . the . . . duty of the courts is to give it effect according to its terms." *United States v. Lexington Mill & Ele-*

tion, offer, shipment, delivery or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of the Act, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful.

Citicorp does attempt to draw some comfort from the carefully circumscribed good faith purchaser exception (Pet. Br. 32-38); we respond to that argument at pp. 19-20.

vator Co., 232 U.S. 399, 409 (1914). See *Andrus v. Sierra Club*, [442 U.S.] 347. Exceptions to clearly delineated statutes will be implied only where essential to prevent "absurd results" or consequences obviously at variance with the policy of the enactment as a whole. *Helvering v. Hammell*, 311 U.S. 504, 510-511 (1941). See *TVA v. Hill*, 437 U.S. 153, 187-188 (1978); *United States v. Key*, 397 U.S. 322, 324-325 (1970); *United States v. American Trucking Assns.*, 310 U.S. 534, 543-544 (1940). [442 U.S. at 551-552.]²

Far from creating "consequences obviously at variance with the policy of the enactment as a whole," taking Congress at its word in construing FLSA § 15(a)(1) is wholly consistent with that policy. In *United States v. Darby*, 312 U.S. 100, the Court sustained § 15(a)(1) as a constitutional exercise of Congress' commerce power. That holding rested squarely on the Court's understanding of the "motive and purpose" of that provision and Congress' underlying "policy":

The motive and purpose of the present regulation are plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows. [312 U.S. at 115.]

The court below, after quoting this passage (and *Darby's* statement of the FLSA's purposes at 312 U.S. 109-110), said:

² See also, e.g., *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643;

This Court, in interpreting the words of a statute, has "some 'scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results . . . or would thwart the obvious purpose of the statute' . . . [b]ut it is otherwise 'where no such consequences would follow and where . . . it appears to be consonant with the purposes of the Act. . . .'" *Commissioner v. Brown*, 380 U.S. 563, 571 (1965) (citations omitted).

Consequently, one of the reasons that Congress passed the FLSA was to exclude tainted goods from interstate commerce. Since Congress wanted to exclude goods that were produced in violation of the FLSA's minimum wage and overtime provisions from interstate commerce, prohibiting secured creditors, such as Citicorp, from shipping "hot goods" in interstate commerce furthers that Congressional intent. Accordingly, we follow the "plain language" of the statute and conclude that the phrase "any person" applies to Citicorp as a secured creditor. [Pet. App. 7a.]

Citicorp does not contend that a construction of FLSA § 15(a)(1), which bars goods from interstate commerce if those goods were produced under substandard labor conditions, without regard to whether the "person" seeking to sell or transport the goods is the employer who produced the goods, or a secured creditor of that employer, would conflict with the purpose of § 15(a)(1) as thus delineated in *Darby*, or the policy of the FLSA as a whole. Rather, Citicorp offers its own highly restrictive view that § 15(a)(1) "is only a mechanism to encourage compliance [by employers] with substantive requirements prescribed elsewhere in the Act." (Pet. Br. 16; see also *id.* 17, 23.) This contention is manifestly untenable.³

³ In the argument that follows, we indulge Citicorp's premise that applying § 15(a)(1) to secured creditors would not further the purpose of assuring employer compliance with §§ 6 & 7's wage and hour requirements. We do so to highlight the point that Citicorp's position is untenable even giving the Company its own ground. We hasten to add, however, that Citicorp's premise is contrary to the most elementary common sense. If § 15(a)(1) is given its due, a solvent employer would know that he could not use substandard goods as security to obtain new capital for his business. And, an insolvent employer would know that he could not reduce his loan balance by producing goods without paying his employees the statutorily prescribed wages because those goods could not be sold by his creditor and, of course, the secured creditor would have no incentive to allow or encourage the employer to continue to produce goods under substandard conditions, as Citicorp did here.

Citicorp's view of § 15(a)(1) cannot, first of all, be reconciled with *Darby*'s authoritative exposition of the provision's purpose. Citicorp, therefore, simply ignores the passage from this Court's opinion quoted at p. 7 *supra*; an omission all the more revealing in light of the Court of Appeals' reliance thereon.⁴ And while Citicorp's failure to do business with *Darby* should be dispositive in this regard, the Company's effort to confine the purpose of § 15(a)(1) is so essential to its position in this case that we shall briefly summarize the abundant legislative record which underlies this portion of *Darby*. As we show, Citicorp's revisionist version of that history (Pet. Br. 19-26) is inexcusably incomplete.

Of course, as Citicorp says, it is the purpose of the FLSA "to establish decent wages and hours for American workers." (Pet. Br. 19.) But Congress did *not* regard § 15(a)(1) merely as a mechanism providing for direct restrictions against employers only, in order thereby to encourage employer compliance with the FLSA's wage-and-hour standards. On the contrary, Congress recognized, on the basis of abundant evidence, that many employers would willingly maintain fair labor standards, but could not afford to do so because the goods which they produced had to compete in the market with goods produced by other employers under substandard conditions. Thus, § 15(a)(1) was not merely "intended to enforce" FLSA §§ 6 & 7 by imposing an added direct restriction on *unfair* employers (as asserted at Pet. Br. 17), but was also, and perhaps primarily, designed to protect the competing *fair* employers. This objective was expressed again and again: in President Roosevelt's message to Congress; in the Joint Committee Hearings; in the Committee Report; and in the floor debates.

In President Roosevelt's May 24, 1937 Message to Congress, quoted in part at Pet. Br. 20, the President said also that

⁴ It is noteworthy, too, that no mention of *Darby* is made in *Wirtz v. Powell Knitting Mills*, 360 F.2d 730 (C.A. 2), which the court below "refuse[d] to follow" (Pet. App. 7a).

to protect the fundamental interests of free labor and a free people, we propose that only goods which have been produced under conditions which meet the minimum standards of free labor shall be admitted to interstate commerce. *Goods produced under conditions which do not meet rudimentary standards of decency should be regarded as contraband and ought not to be allowed to pollute the channels of interstate trade.* [81 Cong. Rec. 4960, 4961, emphasis added.]

Assistant Attorney General Robert H. Jackson, the Administration's opening witness in support of fair labor standards legislation, began his testimony by observing that, in the Sherman Act and the other antitrust laws, Congress had, in the exercise of its commerce power, "prohibited certain practices deemed injurious to competition in interstate commerce". He continued:

What, then, may be said of the employer who cuts wages, employs children, and sweats labor, for the purpose of gaining a competitive advantage in marketing his product in an interstate market? As pointed out by . . . students of constitutional law, since Congress has the power to regulate conditions of competition as it has done through the antitrust acts, it may likewise prohibit the securing of a competitive advantage in interstate commerce through the adoption of oppressive and sweatshop labor conditions.⁵

Returning to this point, he said that the bill also attempts under the philosophy of the antitrust laws, to protect the man who is engaged in interstate commerce on a fair and lawful basis from the competition of those who would go into it on an unfair basis."⁶ Since goods which were produced under substandard labor conditions were to be

⁵ Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor, 75th Cong., 1st Sess., on S.2475 and H.R. 7200, *bills to Provide for the Establishment of Fair Labor Standards in Employment in and Affecting Interstate Commerce*, at 3 (Testimony of Robert H. Jackson).

⁶ *Id.* at 18.

barred from interstate commerce in order to protect fair competitors in other states, the identity of the seller did not matter any more than it would with respect to the sale of other "contraband".⁷

Mr. Jackson, in a passage quoted selectively by Citicorp (Pet. Br. 27-28), said, too:

Even if they [employers who produced goods under substandard conditions] *do not intend* [that these goods be sold in interstate commerce] *and* [the goods] *still do enter into the competition, those unfair goods are excluded from interstate commerce*, and the fact that you change the title by selling them from A to B before they go into interstate commerce does not affect it. If you did, of course, the law would be a nullity, because they could farm out the parts of the work that they wanted to do under substandard conditions.⁸

It is, of course, Citicorp's position that "the fact that you change the title . . . from A to B" through a loan transaction does "affect" the reach of § 15(a)(1).

In the Joint Committee Hearings, the President of Johnson & Johnson added:

. . . In all the discussions which have taken place regarding better wages and shorter hours, I have heard but one good reason for paying low wages and

⁷ *Id.* at 58 (reiterating the President's characterization).

⁸ *Id.* 87 (emphasis added to show Citicorp's omissions). By presenting portions of the foregoing out of their original order, and omitting that which we have emphasized, Citicorp seeks to attribute to Mr. Jackson the view that § 15(a)(1) is directed against "any person" *only* (["f]or that reason") to prevent evasion through subcontracting. (Pet. Br. 27-28.) But that position does not take full account of what Mr. Jackson actually said; his point was that § 15(a)(1)'s prohibition is applicable even if the substandard producer does not intend that the goods be sold in interstate commerce, *viz.*, even if there is no intent to evade the prohibition against such sale. Citicorp's narrow reading is refuted also by Mr. Jackson's explanation of the overall theory of the fair labor standard bill.

working long hours, and that is because some competitor down the street is doing so. . . .

A former member of the New York State Minimum Wage Board explained that state minimum wage orders had largely been restricted to service industries and retail stores, in substantial part because

In administering State wage laws we have had to realize that a neighboring State holds open arms to an employer who feels the pressure of higher standards at home. . . . It is because of this competition which extends beyond State boundaries that Federal regulation of labor standards in interstate commerce is necessary—not as a substitute for State regulation, but as an addition to it.⁹

The Solicitor General's brief in the *Darby* case quoted the testimony cited at nn.9-10, *supra*, and cited about twenty additional items of testimony in the Joint Committee Hearings alone to the same effect. Brief for the United States, No. 82, Oct. Term 1940, pp. 32-34, and n.45, cont.

So, too, the House Committee Report, in explaining the urgency of enactment of a wage and hour bill "during the present session of Congress" stated:

In the last few months, there has occurred an alarmingly sharp decline in business activity. With that decline have come the inevitable wage cuts which the great mass of American businessmen so deplore but are powerless to prevent. These businessmen know that wage cutting sets in motion a vicious spiral of deflation which, if allowed to gather sufficient strength, may threaten the foundations of government itself.

The Federal Government cannot and should not attempt to regulate the wages of all wage earners

⁹ Joint Hearings at 95 (Testimony of Robert Johnson).

¹⁰ *Id.* at 365 (Testimony of Elinore M. Herrick): Like testimony was given by a member of the Wisconsin Trades Practice Commission and the Federal Commissioner of Labor Statistics. *Id.* at 413 (Testimony of Fred M. Wylie); *id.* at 312-313 (Testimony of Isador Lubin).

throughout the United States. But the Federal Government cannot by its inaction permit the channels of commerce to be used to set this spiral of deflation in motion. It cannot and should not permit our great interstate industries to become engulfed. It cannot in silence see the channels of commerce used to spread suffering and destitution.¹¹

The mechanism by which the "channels of commerce . . . spread suffering and destitution" was the competition between goods produced for extremely low wages and goods produced at decent wages.

Against all this, Citicorp quotes from Senator Black's opening speech in the Senate debate on the wage and hour legislation (Pet. Br. 31, n.24). But the Senator there made clear that protecting fair employers from unfair competition was a major objective of the bill. Early in his speech he read into the record a letter from an Alabama lumber operator who supported wage-and-hour regulation. That letter said, in part:

There is prevailing in the lumber industry in the South today a variance in wages of common labor in sawmills and the lumber industry of 10 cents per hour to 27½ cents per hour and weekly hours of 40 to 60 per week.

This difference in wages and hours makes a very unfair competition between producers and has a tendency to lower wages and increase hours per week. It makes hard competition for the mill that wants to shorten hours and pay good wages. [81 Cong. Rec. 7648.]

A colloquy between Senator Black and a colleague is also revealing:

Mr. WALSH. In other words, one of the objectives of the bill is that the progressive employers in good standing will not be subjected in the public market to competition with chiselers and sweatshop operators. Therefore, the board will seek to correct

¹¹ H.R. Rep. No. 2182, 75th Cong., 3rd Sess. at 6.

such a condition by compelling competitive employers to reach the same or better labor standards.

Mr. BLACK. The Senator is correct. . . . [81 Cong. Rec. 7651.] ¹²

On the basis of the evidence just summarized, Congress, in FLSA § 2(a), made five findings, of which we set forth those which are presently most pertinent:

[T]he existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; . . . ; (3) constitutes an unfair method of competition in commerce; . . . ; and (5) interferes with the orderly and fair marketing of goods in commerce. [FLSA § 2(a), 29 U.S.C. § 202 (a).]

In short, as the Court recognized in *Darby* (see p. 7, *supra*, quoting 312 U.S. at 115), the sale in commerce of goods produced under substandard conditions is itself one of the major evils at which the FLSA is directed.¹³ Section 15(a)(1) directly addresses that evil

¹² Citicorp wrests out of context Senator Black's statement that the Senate Committee unanimously agreed to "limit the bill strictly to minimum wages, maximum hours, and child labor . . ." (Pet. Br. 21, n.24.) Senator Black there pointed out that the Committee had decided not to consider provisions "which would have been, in effect, amendments to the Wagner Act." See 81 Cong. Rec. 7658-7659. The bill was "limit[ed] in that sense only.

¹³ Later, in discussing § 15(a)(2), the Court reiterated:

As we have said, the evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by goods so produced with those produced under the prescribed or better labor conditions; and the consequent dislocation of the commerce itself caused by the impairment or destruction of local businesses by competition made effective through interstate commerce. [312 U.S. at 122.]

by prohibiting such sales by any "person" rather than only by "employers".¹⁴

C. As an alternative line of defense against FLSA § 15(a)(1)'s plain words, Citicorp states that §§ 6, 7 & 15(a)(1) are "aimed *principally* at ongoing solvent businesses." (Pet. Br. 17, emphasis added.)

This theory proves too little to be material here. If §§ 6, 7 & 15(a)(1) were not *exclusively* so aimed, Citicorp cannot prevail. And Citicorp, for good reasons, is

¹⁴ Having said at Pet. Br. 16 that § 15(a)(1) "is only a mechanism to encourage [employer] compliance . . .," Citicorp later adds that requiring employers to provide fair conditions in their direct dealings with their employees is also "the jurisdictional basis" of the FLSA (*id.* at 24). This is all part of Citicorp's effort to disparage the "reference to 'competition' in Congress' finding and declaration of policies" as a mere "attempt to bring the prescription of wages and hours within Congress' constitutional power to regulate interstate commerce, and to invoke every 'hopeful approach to constitutionality' for prescription of wages, overtime and child labor standards." (*Id.* at 25.)

Insofar as Citicorp attempts to minimize the weight to be given those findings in construing the statute, that attempt: (1) is foreclosed by *Darby*, which determined the purpose of the Act from those findings (312 U.S. at 109; see also *id.* at 115 and 122, both quoted above); (2) ignores the copious evidence underlying those findings; and (3) more fundamentally, invites this Court to exceed its judicial function in construing statutes as enacted by Congress.

Moreover, insofar as Citicorp is saying that § 15(a)(1) was enacted in part because Congress believed the ban on the interstate movement of unfair goods to be a constitutional means for protecting fair employers in one state from the competition of goods produced at unfair wages in another state, Citicorp is correct, but its point reinforces, rather than cuts against, the conclusion that "any person" means all that the words say. For, insofar as Congress was concerned that other provisions of the Act—for example, § 15(a)(2), which prohibits "employers" from violating §§ 6 & 7 standards—might be held to be unconstitutional, it would have been self-defeating for Congress to permit any exceptions lest some goods which are produced under substandard conditions slip through the law's net to reach the stream of interstate commerce.

not bold enough to assert that the word "employer" in §§ 6 & 7 refers solely to an "ongoing solvent employer."¹⁵

It has been understood from the beginning that the "Act does not exempt employers who are in financial difficulties." *Torres v. American R. Co. of Puerto Rico*, 157 F.2d 255, 256 (C.A. 1) *cert. denied*, 329 U.S. 782.¹⁶ There is, indeed, an especially great need to subject such employers and the goods they produce to §§ 6, 7 & 15(a)(1) (as well as other provisions of the Act). An employer who is in danger of going out of business and/or is insolvent is especially likely, due to his economic necessity, to pay substandard wages. The goods manufactured by such employers have, moreover, the same adverse impact on fair competitors in the interstate market as goods produced under substandard conditions imposed by employers who *can* comply with the statutory labor standards but choose not to do so. On both these counts it is inconceivable that Congress—attempting to stop a deflationary spiral at the time the FLSA was enacted (see pp. 12-13, *supra*, quoting the House Committee Report)—would have excluded from the FLSA's coverage this important class of potential violators or have allowed the goods which such employers produce to be distributed in interstate commerce by "any person".

D. Citicorp argues, too, that the 1938 legislative history shows that Congress determined that "innocent purchasers" are not to be subject to FLSA § 15(a)(1), and that Citicorp is such an "innocent purchaser". (Pet. Br. 28-32.) This theory is predicated in part on FLSA § 3(i), as enacted, and in part on provisions contained

¹⁵ Section 15(a)(1) applies only to goods that were produced in violation of §§ 6 or 7; thus, a showing that the employer here was not subject to those provisions would have provided a complete defense to Citicorp.

¹⁶ There, the First Circuit reversed the District Court's dismissal of an FLSA § 16, 29 U.S.C. § 216, suit by employees to recover the wages due them from an employer who, as the District Court found, "had paid all it could pay 'and thereafter continue operations or avoid insolvency' ". (157 F.2d at 155.)

in the 1938 fair labor standards bill as "introduced and reported out of Committee in both Houses," which were *not* enacted. (*Id.* at 29.) Citicorp's argument is entirely baseless.

First, it is clear that none of the provisions cited by Citicorp were proposed to create an exemption for secured creditors in general or for persons similarly situated to Citicorp in this case in particular. The definition of "goods" quoted at Pet. Br. 29 excludes only goods "after their delivery into the actual physical possession of the *ultimate consumer* other than a producer, manufacturer, or processor thereof," (emphasis added). Citicorp is not the ultimate consumer of the goods at issue here.¹⁷ Turning to the second cited provision (*id.*), Citicorp does not have a "Certificate of Compliance" with the FLSA's wage-and-hour standards either from the proposed Labor Standards Board (as the bill left the committees) or from the producer of the goods (as provided in an amendment adopted on the Senate floor). (*Id.*) Nor, of course, could such a certificate have been obtained here since in fact the goods were *not* produced in compliance with §§ 6 & 7. Finally, Citicorp would not have been eligible for exemption by the Labor Standards Board under the third provision cited (*id.* 29-30), since Citicorp does not, and could not, claim that it "had no reason to believe that any substandard condition existed in the production of the goods."

Thus, no exemption for Citicorp could have been extrapolated from these provisions, singly or in combination, even if the provisions had all become law. Indeed, each of these provisions was narrowly drafted out of "manifest concern" (*cf.* Pet. Br. 31) to avoid creating a

¹⁷ The phrase, "actual physical possession" and the emphatic modifier, "ultimate", are plainly designed to prevent any evasion whereby the goods could be resold in interstate commerce; the phrase, "other than the producer, manufacturer or processor thereof" makes assurance double sure that all such persons will not be treated as an "ultimate consumer".

loophole through which "hot goods" could slip into interstate commerce.

Additionally, only *one* of these provisions was enacted: the definition of "goods" quoted at p. 16, *supra*, which is now FLSA § 3(i). That provision does not even remotely cover Citicorp and, as we have already explained, states the most carefully guarded of exceptions. Section 3(i) thus confirms what is plain from §§ 15(a)(1)'s prohibition and from § 3(a)'s definition of "person"; *viz.*, that Congress *did* "draft the Act broadly to avoid circumvention" (*cf.* Pet. Br. 28).

Citicorp would draw a different lesson. Enactment of the bill without protecting innocent purchasers *in addition* to those protected by § 3(i) and by the § 15(a)(1) exception for common carriers would, says the Company, have been "a dramatic change of policy [which] surely would have prompted at least one comment." (Pet. Br. 31.) Hence, the proper inference from the enactment of these limited exceptions and the non-enactment of other limited exceptions, according to Citicorp, is that Congress intended a general innocent purchaser exception. (*Id.*)

It is a startling suggestion that Congress' unexplained refusal to enact provisions contained in a *committee* bill—which, of course, does not establish *Congressional* policy—gives rise to the inference that Congress nevertheless intended to embody the "policy" of the provisions into law; if any inference from such a sequence is permissible, it is that Congress *rejected* such a "policy". The most appropriate course, however, is to draw neither inference and to construe the statute according to its terms. That is what the court below did, and that is the course that accords with the teachings of this Court. In *Gemsco Inc. v. Walling*, 324 U.S. 244, 260, in construing another provision of the FLSA, the Court declared:

The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly

ambiguous significance, may furnish dubious bases for inference in every direction.¹⁸

E. Citicorp discusses at length the legislative history of a 1949 amendment to FLSA § 15(a)(1) which, as noted at the outset, exempts from its prohibition

a purchaser who acquired [the goods] in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of the Act, and who acquired such goods for value without notice of any such violation.

Citicorp does not claim that the foregoing exception protects the Company in this case. Citicorp cannot so claim for two reasons which appear on the face of the amendment: (1) Citicorp does not have, and could not have received, "written assurance from the producer that the goods were produced in conformity with the requirements of the Act."; (2) Citicorp did not acquire the goods "without notice" of the producer's violation. Citicorp and similarly situated secured creditors differ from the good-faith purchasers who are protected by the 1949 amendment also in a third way, which appears to have been critical to its proponents: Unlike arms-length purchasers, secured creditors *are* in a position to know whether the borrower/employer is in compliance with the Act and *can* protect themselves against noncompliance. (See point II B, *infra*, describing this "typical commercial secured lending transaction" (Pet. Br. 3)). And while Citicorp does contend that the legislative history of the amendment "reveals that Congress rejects the basic premise of the Secretary's argument" (Pet. Br. 32), the Company's contention fails (without regard to its details) for the fundamental reason that the 1949 Congress did not work any change in § 15(a)(1)'s prohibition and that its later debates are therefore not a part of the legislative history of the Act as adopted in 1938.

¹⁸ See also, *e.g.*, *Greenwood v. United States*, 350 U.S. 366, 374: "this is a case for applying the canon of construction of the way who said, when the legislative history is doubtful, go to the statute."

The statements which Citicorp quotes, like those relied on by the losing party in *Oscar Mayer Co. v. Evans*, 441 U.S. 750, 758, were made "11 years after the [statute whose meaning is at issue] was passed . . . and such '[l]egislative observations . . . are in no sense part of the legislative history'. *United Airlines Inc. v. McMann*, 434 U.S. 192, 200 n.7 (1977)." This Court has frequently recognized that "the views of the subsequent Congress form a hazardous base for inferring the intent of an earlier one." *United States v. Price*, 361 U.S. 304, 313. See also, e.g., *Russello v. United States*, 464 U.S. 16, 26; *Jefferson County Pharm. Assn. v. Abbott Labs*, 460 U.S. 150, 165 n.27; *Consumer Products Safety Comm'n. v. GTE Sylvania, Inc.*, 447 U.S. 102 at 117-118 and n.13. As stated in *GTE Sylvania*, "[s]uch history does not bear strong indicia of reliability . . . because as time passes, memories fade and a person's perception of his earlier intention may change."

* * *

The burden of Citicorp's case is that goods which an employer/debtor may not sell in interstate commerce because those goods were produced in violation of the FLSA are magically cleansed by foreclosure and attain greater value in the creditor's hands than they had in the debtor's. That position is contrary to the broad, unambiguous language of FLSA § 15(a)(1) and Congress' policy, effectuated by that provision, "that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows," *United States v. Darby*, 312 U.S. at 115.

II. Citicorp Mischaracterizes The Issue Before The Court

At the outset of its tendentious statement of the case, Citicorp introduces the two dominant themes of its argument: that this is a case involving "creditors' rights;" and that the Company's "innocence" protects it from FLSA § 15(a)(1)'s restrictions (Pet. Br. 2-3). At the close of its brief (*id.* 46-49), Citicorp goes so far as to

argue that this Court should not examine the statutory issue in this case on its merits because of a decision twenty years ago by the Second Circuit; a decision whose reasoning and result the court below, after careful analysis, "refuse[d] to follow" (Pet. App. 7a-12a). These frenetic efforts to avoid the unmistakable lesson taught by the statute and its legislative history avail Citicorp nothing.

A. Citicorp accuses the court below of ignoring the "distinction . . . between wage and hour standards and creditors' rights" (Pet. Br. 2). In truth, however, it is Citicorp which predicates the major part of its case on the eradication of that distinction.

Citicorp attributes to the court below a holding that § 15(a)(1) grants employees who have not been paid the wages due them under the FLSA a "priority" in the goods superior to that which a secured creditor has under state law by virtue of its perfected lien on those goods. The Court of Appeals made no such error. *That court did not dispute that Citicorp lawfully possesses the goods on which the Company foreclosed; and the court below did not grant Ely's employees (or the Secretary) any possessory interest in those goods.* As the Court of Appeals explained, in direct response to Citicorp's claim of a conflict with the priority scheme of the Bankruptcy Act:

Our holding does not change the priorities in bankruptcy. Citicorp "owns" the goods. The "hot goods" provision merely prevents Citicorp from shipping, delivering or selling the goods in interstate commerce. [Pet. App. 10a.]

The fact that Citicorp has the option to cure the violation of FLSA §§ 6 & 7 by paying the employees the statutorily required amounts and to thereby remove the taint from the goods, does not justify Citicorp's mischaracterization of the ruling below. (Pet. Br. 13.) In this respect, Citicorp, and any other secured creditor, is in no different position than an employer who has produced

goods in violation of §§ 6 or 7. It is common ground that § 15(a)(1) prohibits such an employer from shipping those goods, but he, too, can remove the taint by paying the employees the wages due them under the FLSA. Citicorp has not argued that § 15(a)(1) thereby creates a lien against the employer in favor of employees or grants the employees a "priority" interest in those goods superior to that of the employer. Citicorp's assertion that the decision below creates a "lien" in favor of the employees is no less artificial.¹⁹

The decision below does not therefore limit any of the "creditors' rights" (Pet. Br. 2), created by the states through Article 9 of the Uniform Commercial Code (*id.* 38-41). The Code does not grant foreclosing creditors a right to sell goods which public law—state or federal—would forbid the debtor to sell if he were their owner; nor, and more to the point, did any of the state uniform laws, cited at Pet. Br. 23, n.27, which were in effect in 1938, when § 15(a)(1) was enacted, do so. Neither the Code nor its predecessors regulate at all the conditions under which it is lawful or unlawful to sell goods in interstate commerce. That is a subject with which Congress has historically dealt, in part through § 15(a)(1)

¹⁹ Likewise misleading is Citicorp's contention that what it chooses to characterize as a "lien" would be "secret" (Pet. Br. 13, 38, 39 n.59).

While the prohibition against the sale of the goods in interstate commerce, if the employees' wages are not paid, may be "secret" in the sense in which the term is used here, (*viz.*, in Citicorp's special vocabulary (*id.*)), it would not be "secret" in any customary usage. For that prohibition is contained in § 15(a)(1)'s unambiguous words, of which potential creditors, like the public generally, have notice. And, under financial arrangements of which this transaction is typical (Pet. Br. 3), secured creditors know, or have the means of determining, whether the employer is violating FLSA standards, and whether the goods the employer produces are potentially subject to § 15(a)(1)'s restriction (see pp. 25-27, *infra*).

It is true that § 15(a)(1)'s restriction on sale is not recorded by filing with state officials (*cf.* Pet. Br. 4, n.3); but that is because there is no "lien" to be recorded.

in regulating "wage and hour standards" (*id.* 2), and, in part, in other laws as well, and which has not heretofore been claimed to be the office of creditors' rights legislation. "Secured creditors such as Citicorp take their security subject to the laws of the land." (Pet. App. 33a, 25a.) In short, to construe § 15(a)(1) according to its terms to include goods which are in the possession of secured creditors does not preempt any state creditors' rights law.²⁰

Once it is recognized that the decision below does not create any "lien" in the goods, the specters which Citicorp raises of "irreconcilable conflict between the FLSA and other federal statutes" (Pet. Br. 42), are also quickly exorcised. The Bankruptcy Code's scheme of priorities remains intact; and while, under the Code, a "trustee is obligated to liquidate the bankrupt's estate including inventory" (*id.* 43), the Code does not purport to free the trustee from the restriction of other laws in so doing. As Judge A. N. Hand wrote in *Cullen v. Bowles*, 148 F.2d 621, 623 (C.A. 2):

It has been generally held that federal statutes regulating business in the public interest are equally applicable when the business is run by trustees or

²⁰ We stress, however, that if there were any state laws which would allow shipment in interstate commerce of goods which were produced in violation of FLSA §§ 6 & 7, such laws would be preempted by § 15(a)(1). Citicorp properly concedes that an Act of Congress preempts state law if to do so is "essential to accomplish the purposes of the statute" (Pet. Br. 38). Under a correct view of the FLSA's purposes the exclusion from interstate commerce of goods which were so produced is "essential to accomplish Congress purposes". (See pp. 7-15, *supra*.) As the Court of Appeals said:

Congress does not want "hot goods" to taint the channels of interstate commerce. Furthermore, the "hot goods" in this case will compete with goods produced in conformity with the FLSA's minimum wage and overtime provisions if Citicorp places the goods in interstate commerce. The FLSA protects manufacturers who comply with the minimum wage and overtime provisions by keeping "hot goods" out of interstate commerce. [Pet. App. 10a.]

receivers. Thus a receiver operating a railroad has been held subject to a statute prohibiting a common carrier from transporting livestock by rail from a quarantine district to another state. *United States v. Nixon*, 235 U.S. 231; see also *Erb. v. Morasch*, 177 U.S. 594. Similarly, the receiver of a railroad has been held subject to the federal hours of labor law. *United States v. Ramsey*, 8 Cir., 197 F.144.²¹

The other federal statutes cited at Pet. Br. 44-45 are likewise irrelevant because their respective priority schemes also remain undisturbed by the Court of Appeals' construction of § 15(a)(1).²² And since each of those statutes was enacted long after the FLSA (see *id.*), the "cardinal principle of statutory construction that repeals by implication are not favored", invoked at Pet. Br. 13-14, 42, would, if applied, cut strongly against Citicorp's position that these statutes provide a basis for narrowing § 15(a)(1). No more helpful to Citicorp is the other canon which the Company quotes (*id.* at 42-43): "where . . . statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." For, § 15(a)(1) can be applied effectively to prevent secured creditors from selling "hot goods" across state lines even if one assumes, *arguendo*, that IRS agents and sellers of cattle and other agricultural commodities are not so restricted. Nor does the possibility that the term "any person" could be construed to exclude

²¹ So, too, in *Donovan v. TMC Industries, Ltd.*, 20 B.R. 997 (N.D. Ga.), the District Court granted the Secretary of Labor an injunction under FLSA § 17, 29 U.S.C. § 217, to enjoin debtors in bankruptcy from shipping goods in interstate commerce in violation of § 15(a)(1). The court rejected an argument on the part of the bankrupt defendants which is identical to that which Citicorp here bases on the Bankruptcy Code. (See *id.* at 1000.)

²² The 1976 Amendments to the Packers and Stockyard Act ("PSA"), 7 U.S.C. § 196, and the 1984 Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. § 499e(c) cited at Pet. Br. 42, n.67 and 44-45, are of interest chiefly in illustrating that Congress is not unwilling to override state priority schemes.

representatives of the sovereign.²³ or the special beneficiaries of farm legislation, permit the conclusion (*id.* 44), that the breadth of the statutory phrase can be disregarded at the behest of secured creditors who are neither.²⁴

B. (1) Citicorp repeatedly describes itself as "innocent" and sometimes even as "wholly innocent." But except with respect to good-faith purchasers without notice who are protected by the 1949 amendment to § 15(a)(1) (quoted at p. 18 *supra*), Congress has not distinguished between innocent "persons" and noninnocent "persons" who ship substandard goods in interstate commerce.²⁵ Thus, the Court of Appeals properly adhered to the statute in refusing to distinguish "between innocence and culpability", as Citicorp says that court should have done (Pet. Br. 2-3). Nevertheless, since we are told that "this case arises out of a typical commercial secured lending transaction" (*id.* at 3), it may be enlightening to examine just how "innocent" Citicorp actually is.

²³ See *United States v. Cooper Corp.*, 312 U.S. 600, 606.

²⁴ It is far less clear to us than it is to Citicorp that if the question were ever to arise, the courts would hold that the IRS is not subject to § 15(a)(1), and may sell "hot goods" in commerce despite the effect of doing so on fair competitors. It is likewise uncertain how the courts would resolve conflicts among the respective interests sought to be protected by the FLSA, on the one hand, and the PSA and PACA, on the other.

²⁵ What this Court said in *Darby* with respect to § 15(a)(2) is equally pertinent here:

Congress, to attain its objective in the suppression of nationwide competition in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer. It recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great. See H. Rept. No. 2182, 75th Cong., 1st Sess., p. 7. *The legislation aimed at a whole embraces all its parts.* [312 U.S. at 123, emphasis added]

As Citicorp acknowledges, under its agreement with Ely, "payments from Ely's customers were deposited in a Citicorp account, and applied against the advances made by Citicorp" (Pet. Br. 4, n.2). Citicorp's "advances" were made on a day-to-day basis, covering all of Ely's expenses, including the payroll. (Pet. App. 19a, ¶ 3.) On February 8, 1985, Citicorp decided (as the Company had the right to do) not to make any more advances and, on February 11, Citicorp so notified Ely (but *not* Ely's employees). On the same day, Citicorp also decided, at Ely's request, to permit the latter to continue its operations.²⁶ Thus, as the trial record in both cases shows and, as one District Court expressly found:

While there is no evidence of collusion between officials of Citicorp and Ely Group, Inc., the evidence does show that Citicorp knew it was funding the payroll of Ely Group, Inc., and when this funding ceased Ely could not meet its payroll obligations to its employees. [Pet. App. 19a, ¶ 3.]

Citicorp's actual knowledge aside, under § 16(a) of its agreement with Ely, the Company had access to all of Ely's books and records, including payroll records. (C.A. App. 366) From the latter, Citicorp elected to ascertain only whether payroll taxes had been paid, and to disregard whether the employees were being paid in accordance with the FLSA's requirements. (See Pet. App. 20a, ¶ 5.)

Thus, what the Fifth Circuit said with respect to the "good faith" test under the 1949 exception to § 15(a)(1) applies with even greater force to Citicorp's attempt to secure, by judicial construction, an exception for "innocent" secured creditors:

²⁶ The record also shows that on February 15 Citicorp learned that some payroll checks presented by employees for work previously performed had been dishonored. (C.A. App. 303)

"Good faith" under the Act does not include ignoring the obvious. Lone Star Steel Company had the contractual right to inspect the records of the contractors at any time. A good faith effort to comply with the Act would have included checking their records and any further investigation necessary to ascertain the facts. A person or a corporation cannot take an "ostrich-like attitude" and still be in good faith under the Fair Labor Standards Act. [*Wirtz v. Lone Star Steel Company*, 405 F.2d 668, 670 (C.A. 5).]

Moreover, going beyond what Citicorp must have known, or deliberately refused to learn, the realities of the transaction makes it plain that in February 1985, and even well before, Citicorp's economic interest in the goods which were being produced at Ely's plant was, realistically, as great as Ely's interest. Since all payments by customers for goods produced and sold were made to Citicorp's bank account, those payments directly benefitted Citicorp, while reducing Ely's loan balance.²⁷ Citicorp knew, when the Company allowed Ely to continue operations, that if the goods to be produced were sold by Ely, it would be for Citicorp's account. On the other hand, if, as eventuated, foreclosure became necessary, "Citicorp then planned to collect Ely's receivables, and to liquidate [*i.e., sell*] the inventory collateral and apply the proceeds against the outstanding Ely loan balance of approximately \$9.5 million," (Pet. Br. 5). In either event Citicorp would get the money, Ely would get a reduction of its loan balance and the workers who produced the goods would get *nothing*.

(2) Citicorp also asserts that to apply § 15(a)(1) against secured creditors would be to "punish" them *E.g.*, (Pet. Br. 28, 31) Of course, a prohibition against the sale of goods in interstate commerce is not punishment in any legal sense. Cf. *Kennedy v. Mendoza-*

²⁷ Citicorp also received money from customers "for goods that were worked on or shipped during the period of time that employees missed payrolls in Memphis." (See C.A. App. 322).

Martinez, 372 U.S. 144, 168-169. Indeed, § 15(a)(1) does not provide for a sanction against prohibited conduct; that is the function of FLSA §§ 16 & 17. The only true "punishment" provided is in § 16(a)(1) which permits the imposition of fines and imprisonment for violations of § 15 (imprisonment being authorized only after conviction of the same crime for a prior offense under § 16(a)(1)). It is simply not "punishment" to subject a party to economic regulation, even where that regulation costs the regulated party money.²⁸

C. Because in 1966 *Wirtz v. Powell Knitting Mills*, 360 F.2d 730 (C.A. 2) held that § 15(a)(1) does not apply to secured creditors, Citicorp closes by urging that "[e]ven if there were some basis for concluding that the Second Circuit was wrong in *Powell Knitting*, judicial re-examination of the rule would be inappropriate at this late date,"²⁹ despite disagreement therewith by another Court of Appeals in a reasoned decision.³⁰ This is an

²⁸ Even on Citicorp's theory that § 15(a)(1) creates a "lien" in favor of the employees superior to that to the secured creditor, it could not be said that the secured creditors are thereby "punished". A statutory scheme of priorities, such as the Uniform Commercial Code, does not "punish" the subordinated parties.

²⁹ Citicorp goes further still by asserting both at the beginning (Pet. Br. 2) and close (*id.* 47-49) that it has been settled for "nearly 50 years" that secured creditors are not subject to § 15(a)(1); the Company does so although advising, in the middle of the brief, that in 1938 "inventory and accounts receivable financing was in its infancy" (*id.* p. 23).

³⁰ The Sixth Circuit said: "Although we are reluctant to create an inter-circuit conflict, we cannot agree with the Second Circuit's 'judicially created exception' [to § 15(a)(1).]" (Pet. App. 9a). This approach is entirely correct. As Judge Posner has recently written:

Bearing in mind the interest in maintaining a reasonable uniformity of federal law and in sparing the Supreme Court the burden of taking cases merely to resolve conflicts between circuits, we give most respectful consideration to the decisions of the other courts of appeals and follow them whenever we can. * * * But neither this court nor the district courts of this

argument borne of desperation, for it reverses the hierarchical relationship among the federal courts: The "construction of a national statute" is not "settled" (*id.* 47) until it has been declared by *this Court*.³¹ And, of course, under the doctrine of *stare decisis* (*id.* at 47 and 49, and nn.74-76, 79) this Court adheres to its own prior decisions but not those of inferior courts.³²

circuit give the decisions of other courts of appeals automatic deference; we recognize that, within reason, the parties to cases before us are entitled to our independent judgment. [*Colby v. J.C. Penney Company, Inc.*, 43 FEP Cases 47, 50 (C.A. 7, Feb. 10, 1987).]

³¹ There is no basis for Citicorp's presumption that Congress was aware of *Powell Knitting* when it amended other provisions of the FLSA (Pet. Br. 46). See *Aaron v. SEC*, 446 U.S. 680, 694. Nor is "Congress' failure to amend § 15(a)(1) . . . evidence" concerning Congress' original intent in enacting the provision. See pp. 19-20, *supra*.

³² Citicorp's extraordinary proposal that an earlier decision of a Court of Appeals should be regarded by this Court as the final word on the interpretation of a federal regulatory statute—or as entitled to greater weight than the persuasiveness of its reasoning would warrant—is the functional equivalent of a "rule allowing nonmutual collateral estoppel against the government", contrary to *United States v. Mendoza*, 464 U.S. 154, 160. Such a rule was rejected because it

would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari. [Citations omitted.] Indeed, if nonmutual estoppel were routinely applied against the Government, this Court would have to revise its practice of waiting for a conflict to develop before granting the Government's petitions for certiorari. [464 U.S. at 160.]

Moreover, even as the rule rejected in *Mendoza* would have required substantial revision of "the Solicitor General's policy to determine when to appeal an adverse decision," so the approach for which Citicorp contends "would force the Solicitor General to abandon [the] prudential concerns "which underly his decision whether to seek certiorari in the absence of an inter-circuit conflict." *Id.* at 160, 161.

Finally, Citicorp says that *Powell Knitting* should not be re-examined because "adopting the Secretary's interpretation of Section 15(a)(1) would tend to discourage secured lending and increase the costs to borrowers", and "commercial lenders would be forced to reevaluate the adequacy of their collateral and the availability of additional funding under existing agreements, which were negotiated in reliance on the authority of *Powell Knitting*," (Pet. Br. 48). The representation that lending transactions are actually planned and priced on the assumption that the lender will receive the benefits of the unpaid labor of the borrower's employees does Citicorp and its industry little credit. And it would certainly have been contrary to Congress' policy in 1938 to enable employers to borrow money more cheaply by permitting the lender to place into commerce goods produced by workers who did not receive the wages prescribed by the FLSA. As for Citicorp's other economic arguments, "determination and evaluation of the consequences" should indeed "be left to Congress" (*id.* at 48-49).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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